STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUPERIOR FARMING COMPANY, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 77-CE-33-1-D 4 ALRB No. 44

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

On December 3, 1977, Administrative Law Officer (ALO) David C. Nevins issued his attached Decision in this matter. Thereafter Respondent, the General Counsel and the United Farm Workers of America, AFL-CIO (UFW) each filed exceptions and a supporting brief. Respondent also filed a brief in answer to the exceptions of the General Counsel and the UFW. By leave of the Board, an amicus curiae brief was filed by the law firm of Thomas, Snell, Jamison, Russell, Williamson & Asperger on behalf of agricultural employers not parties to this proceeding.[1/]

[1/] The UFW requested and received permission from the Executive Secretary to respond to the amicus brief but later advised the Board that it would rest on its exceptions brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, including Respondent's reply brief, and the amicus brief, and has decided to affirm the rulings, findings, [2/] and conclusions of the ALO and to adopt his recommended Order as modified herein.

Respondent stipulated that it refused to bargain with the UFW in order to obtain judicial review of the Board's certification in Superior Farming Company, 3 ALRB No. 35 (1977) but excepted to the ALO's finding that it thereby violated Section 1153 (e) and (a) of the Act.[3/] The ALO reached a proper conclusion and we so find.

The ALO recommended the conventional cease-and-desist order which attaches whenever a Section 1153(e) violation has been established, and also an "interim" remedy which would require Respondent to post notices and provide the UFW access to its bulletin boards so that its employees might be kept fully informed concerning the progress of this case and subsequent related appellate review proceedings. He did not, however,

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[2/] Although not expressly so found by the ALO, our review of the facts set forth in the stipulation discloses that the Respondent's refusal to bargain commenced on May 26, 1977, the date on which the UFW made its initial bargaining demand upon Respondent. We adopt that date as the commencement of the Respondent's make-whole liability.

[3/] Respondent also excepted to the ALO's denial of its motion to reopen the hearing in the prior representation matter and urges the Board to now review and invalidate the election. As Respondent has established no basis for relitigating its post-election objections, such as a showing of newly-discovered or previously-unavailable evidence, or other special circumstances, we affirm the ALO's denial of the motion. See related discussion and citations in Perry Farms, Inc., 4 ALRB No. 25 (1978), sl. op. at 4.

recommend the make-whole remedy which Section 1160.3 authorizes in refusal to bargain cases. The ALO held that this is not an appropriate case for make-whole relief because Respondent's refusal to bargain was the sole means at its disposal to obtain court review *of* a debatable issue in the prior, related representation case, noting that Respondent had not engaged in dilatory tactics in order to avoid the bargaining obligation. We accept the ALO's recommendation for a cease-and-desist order, but we reject his "interim" relief recommendation on the grounds that it does not adequately remedy the employees' economic losses resulting from Respondent's refusal to bargain.

In Perry Farms, Inc., 4 ALRB No. 25 (1978), we held that a make-whole award under Section 1160.3 of the Act is appropriate where the Respondent has been found to have refused to bargain in violation of Section 1153(e) and (a) of the ALRA, and its employees suffer losses of pay as a result. We adhere to that interpretation of the statute in the present case and shall hereafter order that the Respondent make its employees whole for any losses of wages and economic benefits they have suffered as a result of Respondent's conduct.

In Perry Farms, Inc., supra, we indicated that our evaluation of the propriety of a make-whole award was the product of a balancing of the interests of the Employer and its employees in light of the goals and policies of the Act. By contrast, both the ALO and our dissenting colleague have placed only the interest of the Respondent on their scales, and they consequently reach a conclusion which fails to account for the

interests of the affected employees. The essential fact of this case, which they overlook, is that after a process which provided the Respondent with full opportunity to present evidence, and examine and cross-examine witnesses, the Board overruled its objections to the election and certified the UFW as the exclusive bargaining agent of Respondent's employees. It is well established that an employer refuses to recognize a certified union at its peril. See, e.g., Allstate Insurance Co., 234 NLRB No. 21 (1977). In cases such as this, the state of mind of the Respondent is not material; all that existing precedent requires is a showing of refusal to meet and bargain in good faith with the certified union. E. V. Williams Co., Inc., 175 NLRB 792 (1969).

The violation established, an effective remedy must be fashioned. The ALO and our dissenting colleague would impose no substantive remedy for employees' losses, because of their analysis of the Respondent's state of mind in refusing to bargain with the UFW. The comments of the Supreme Court of the United States, considering an analogous contention regarding the back pay language of Title VII of the Civil Rights Act of 1964 are pertinent here: "[t]his would read the 'make-whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in

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'bad faith[1]."[4/] Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975).

In place of a remedy designed to compensate employees, the dissent's approach would substitute a punitive device; that is, one designed to punish a class of employers because of the relative offensiveness of their behavior. In the words of the Court in Albemarle, supra, at 422, the remedy would become " . . . a punishment for moral turpitude . . . ." The exercise of discretion based upon such subjective considerations will, in our view, [11]. . . produce different results for breaches of duty in situations that cannot be differentiated in policy." Moragne v. States Marine Lines, 398 U.S. 375, 405 (1970). As we have discussed at length in Perry Farms, Inc., supra, and Adam Dairy, 4 ALRB No. 24 (1978), the purposes and policies which support the system of labor-management relations the ALRA was designed to establish, the discussion need not be repeated here. Suffice it to say that we perceive no statutory purpose which is advanced by shifting the cost of a court appeal of the Board's certification from Respondent to its employees.

The ALO concluded that this Board's Decision in

[4/] The City of Los Angeles, Dept. of Water and Power v. Manhart, 98 S.Ct. 1370, 55 L. Ed. 2d 657 (April 25, 1978) case cited by the dissent does not undermine this analysis. The Court expressly cited with approval its decision in Albemarle. Its conclusion to set aside the award of retroactive damages in City of Los Angeles was largely the product of an analysis of the unique character of pension insurance funds, and the Court's apprehension that the payment of a large damage award out of the body of the fund could have a devastating impact on innocent third parties who were relying on the plan for future benefits. 98 S.Ct. at 1382-83. The record before us contains no evidence of similar factors.

Western Conference of Teamsters, 3 ALRB No. 57 (1977) , to adopt the frivolous/debatable standard for the award of attorney's fees in unfair labor practice cases, provided insight into the issues surrounding the implementation of the make-whole award. We do not agree with this analysis. Initially, the ALO's approach is founded on the assumption that the award of attorney's fees to the prevailing party and the make-whole provision are both "extraordinary" remedies. In material respects this is not an accurate statement. As we indicated in the Western Conference case, in the American system of jurisprudence the very concept of an award of attorney's fees to the prevailing party is an extraordinary one. Whatever else may be said about the make-whole provision in the Act, in concept it is not unusual; it is a compensatory remedy designed to restore to the employees that which they have lost because of the Respondent's conduct. We observe also that while an award of attorney's fees may in an appropriate case fulfill certain statutory objectives, these awards do not share with the make-whole provision a central significance to the system of collective bargaining which the law seeks to establish.

The Remedy

In accordance with our Decision in Perry Farms, supra, we shall order that Respondent, rather than its employees, bear the costs of the delay which has resulted from its failure and refusal to bargain with the union, by making its employees whole for any losses of pay and other economic benefits which they may have suffered as a result of said delay for the period from

May 26, 1977, to such time as Respondent commences to bargain in good faith and continues so to bargain to the point of a contract or a bona fide impasse. The Regional Director will determine the amount of the award herein based in general upon the criteria set forth in Perry Farms, supra, and Adam Dairy, supra.

Because the certification in this case issued much later than the certifications in Adam and Perry, the data used to arrive at a basic make-whole wage in those cases may not provide such a satisfactory basis for a make-whole computation in this case. See Adam Dairy, supra, at page 19. We shall therefore direct the Regional Director to investigate and determine a new basic make-whole wage in this matter. The investigation should include a survey of more-recently-negotiated UFW contracts. In evaluating the relevance of particular contracts to a determination of the make-whole award in this case, the Regional Director should consider such factors as the time frame within which the contracts were concluded as well as any pattern of distribution of wage rates based on factors such as were noted in Adam Dairy, supra; i.e., size of work force, type of industry, or geographical location. We note, however, that the Bureau of Labor Statistics data which we used in Adam Dairy to calculate the dollar value of fringe benefits are unchanged, so that the Regional Director's investigation and determination herein need be concerned only with establishing an appropriate wage rate or rates for straight-time work. See Adam Dairy, supra, at 24-28.

The order in this case shall include a requirement that Respondent notify its employees that it will, upon request,

meet and bargain in good faith with their certified collective bargaining representative. In addition to the standard means of publicizing the Notice to Employees, we believe that the Notice herein should also be distributed to all employees who participated in the election on September 10, 1975,[5/] in which the UFW was designated and selected as their bargaining agent. Accordingly, we shall order distribution of the Notice to all employees of Respondent who were on its payroll for the period immediately preceding the filing of the petition for certification herein on September 2, 1975.

ORDER

Pursuant to Labor Code Section 1160.3, Respondent, Superior Farming Company, Inc., its officers, successors, and assigns is hereby ordered to:

1. Cease and desist from:

(a) Refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW) as the certified collective bargaining representative of its agricultural employees in violation of Labor Code Section 1153(e) and (a).

(b) In any other manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed to them by Labor Code Section 1152.

[5/] September 10, 1975, rather than September 11 as stated in the Board's original decision, is the record date of the election conducted in this matter. We hereby correct the first line of our decision in Superior Farming Company, 3 ALRB No. 35 (1977), to show the date of the election as September 10, 1975.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the exclusive representative of its agricultural employees and, if an agreement is reached, embody its terms in a signed agreement.

(b) Make its agricultural employees whole for all losses of pay and other economic benefits sustained by them as the result of Respondent's refusal to bargain for that period of time between May 26, 1977, and the date on which Respondent commences to bargain collectively in good faith and thereafter bargains to the point of a contract or a bona fide impasse.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due its employees under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice for 90 consecutive days at places to be determined by the Regional Director.

(f) Provide a copy of the attached Notice to each employee hired by Respondent during the 12-month period following the issuance of this Decision.

(g) Mail copies of the attached Notice in all

appropriate languages, within 30 days from receipt of this Order, to all employees deemed eligible voters in the election conducted on September 10, 1975, and those employed by Respondent from and including May 26, 1977, until compliance with this Order.

(h) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at peak of season at such times and places as are specified by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a

period of one year from the date on which Respondent commences to bargain in good faith with said union.

Dated: July 13, 1978

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER McCarthy, Dissenting:

For the reasons stated in my concurring opinion in Perry Farms, Inc., 4 ALRB No. 25 (1978), I continue to oppose the majority's nonselective application of the make-whole remedy. The matter before us illustrates why the applicability of the remedy cannot be determined until after the Board has reviewed the particular circumstances in each case. Respondent herein has in good faith pursued the only lawful means by which it may place a legally and factually debatable claim before the courts of appeal.[1/] This is not, therefore, the type of case which justifies the Board's severest form of remedial relief.

[1/]Respondent's conduct constituted a requisite first step by which to obtain judicial review of the validity of the Board's Decision in Superior Farming Company, 3 ALRB No. 35 (1977). As immediate and direct review of representation matters is not available under existing law, the only manner in which an aggrieved party can contest a Board certification is to refuse to bargain and then assert its objections to the election as an affirmative defense in a subsequent Section 1153(e) proceeding. Accordingly, Respondent refused to meet and negotiate with the newly-certified United Farm Workers of America, AFL-CIO, in order to precipitate the unfair labor practice charge and complaint which underlies this proceeding. Further, it is uncontested that Respondent sought to expedite these proceedings in order to obtain early judicial review of its challenge to the certification.

An independent analysis of the record in this matter will not support a finding that Respondent's procedural stance is motivated by a disregard for the law, or that the grounds for its litigation posture "are frivolous, or that it engaged in dilatory tactics for the sole purpose of delaying the onset of bargaining. By contrast, I found Perry Farms, supra, to be an appropriate case for the make-whole remedy because the record clearly demonstrated a bad faith refusal to bargain stemming from a strong anti-union animus on the part of the employer.

Labor Code Section 1156.3 requires the Board to exercise its discretion in determining the appropriate circumstances for application of the make-whole remedy. This is an area which calls for a careful balancing of the competing interests. By making the remedy one which is to be applied in a discretionary manner, the Legislature has already determined that the equities in a refusal to bargain situation do not always preponderate in favor of the employees.

I acknowledge the majority's concern that delays in the implementation of bargaining rights won at an election may create a potential economic burden for the employees in question. But application of make-whole relief without inquiry as to whether an employer is acting in good faith is an unreasonable restraint on the right of review as long as the refusal to bargain remains the employer's only recourse to the courts for the purpose of challenging a Board certification. Under the majority's approach to make-whole, employers with legitimate grounds for challenging an election may be coerced into foregoing

court review because of the inordinate financial burden that would be incurred if the certification were to be upheld. Instead, make-whole should be applied selectively so that it does not have this chilling effect, and yet serves as a deterrent to employers who would raise frivolous objections to the election or use the court's processes simply for dilatory purposes.[2/]

[2/] The majority uses a Title VII case, Albemarle Paper Co. v. Moody, 422 U.S. 405, to conclude that good faith conduct on the part of the employer is an irrelevant consideration where the make-whole remedy is concerned. However, the majority overlooks the fact that the Supreme Court has, in a case subsequent to Albemarle, City of Los Angeles, Dept. of Water & Power v. Manhart, 98 S.Ct. 1370, 55 L. Ed. 2d 657 (April 25, 1978), held that back pay is not to be awarded automatically in every case, that the district courts still have a duty to determine whether such relief is appropriate. In making that determination, the courts are to be sensitive to equitable considerations, including the impact that the make-whole award would have on employers who are acting in good faith. 98 S.Ct. at 1381-1383, fn. 44.

It should also be noted that the Albemarle presumption in favor of retroactive relief is made feasible by the fact that losses to employees in Title VII cases are readily demonstrable and susceptible of precise calculation. On the other hand, in refusal to bargain cases, there is absolutely no assurance that any contract would have been entered into by the parties, and determining what wages would have been under the supposed contract is a highly speculative process. Thus, even more than in the Title VII setting, the make-whole remedy under our Act requires sensitivity to equitable considerations.

Precedent for use of a good faith/bad faith criterion does exist within the refusal to bargain context. Although the NLRB is without specific statutory authority to grant make-whole awards, the courts have proceeded on the assumption that the Board is empowered to grant such relief under the National Labor Relations Act. Federal courts have held that the make-whole remedy is inappropriate where the refusal to bargain is premised on a factually debatable question and where the litigation was not engaged in to delay collective bargaining. See, e.g., International Union of Electrical, Radio & Machine Workers, AFL-CIO v. NLRB [Tiidee Products], 426 F. 2d 1243 (D.C. Cir., 1970), cert, denied, 400 U.S. 950 (1970); United Steelworkers of America v. NLRB [Metco, Inc.], 496 F. 2d 1342 (5th Cir., 1974); Bartenders Local 703 v. NLRB [Restaurant & Tavern Assn.], 488 F. 2d 664 (9th Cir., 1974); Retail Clerks Union, "Local 1401 v. NLRB [Zinke's Foods], 463 F. 2d 316 (D.C. Cir., 1972).

Aside from the normal time and cost requirements of litigating the unfair labor practice, the employer always runs the risk that the union will call for a legal strike in an attempt to force agreement on a contract. Now the added prospect of make-whole imposes an additional burden, one that is particularly unfair to the smaller grower who may have great difficulty withstanding the normal risks let alone the requirement that he pay damages to employees for the delay in collective bargaining.

The Administrative Law Officer in this proceeding took these factors into account when he held that, for an employer who refuses to bargain in order to test the certification, make-whole relief is appropriate only in those cases where it is shown that the employer's litigation posture is based on frivolous grounds or when it is designed to delay the bargaining obligation. This is a reasonable standard and one which I endorse.

Accordingly, I would affirm the findings, rulings, and conclusions of the Administrative Law Officer as set forth in the attached Decision.

Dated: July 13, 1978

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to bargain with the UFW. The Board has ordered us to post this Notice and to take certain additional actions. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives farm workers these rights:

(1) To organize themselves;

(2) To form, join, or help any union;

(3) To bargain as a group and to choose anyone they want to speak for them;

(4) To act together with other workers to try to get a contract or to help or protect each other; and

(5) To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL, on request, meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

WE WILL reimburse each of our employees for any pay which they may have lost as a result of our refusal to bargain with the UFW.

Dated:

SUPERIOR FARMING COMPANY, INC.

By: _____
(Representative) (Title)

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

DISSENTING OPINION

In a separate opinion Member McCarthy concluded that he would adopt the ALO's Decision and not order make-whole relief in this case. Reiterating his opposition to the automatic application of make-whole relief in all refusal to bargain cases, McCarthy concluded that an independent review of the record in this case did not show that the Respondent's procedural stance was motivated by a disregard for the law/ or that its litigation posture was frivolous, or that it engaged in dilatory tactics for the sole purpose of delaying its bargaining obligation. In McCarthy's view, so long as the refusal-to-bargain charge was the only vehicle by which the underlying certification might be subject to court review, the imposition of make-whole without inquiry into the good faith of the Respondent imposed an unreasonable restraint on that review process. Challenging the majority's reliance upon language in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) regarding back pay awards in employment discrimination cases, the dissent noted that in City of Los Angeles, Dept. of Water & Power v. Manhart (April 25, 1978), 98 S.Ct. 1370, 55 L. Ed.2d 657 the Supreme Court stated that make-whole awards are not automatic, and the tribunal must yet be guided by equitable principles.

CASE SUMMARY

Superior Farming Company, Inc.

4 ALRB No. 44
Case No. 77-CE-33-1-D

ALO DECISION

Based upon Respondent's stipulation that it had refused to bargain with the UFW in order to gain judicial review of the Board's certification in Superior Farming Company, 3 ALRB No. 35 (1977), the ALO concluded that Respondent had violated Section 1153(e) and (a) of the Act. However, the ALO declined to award "make-whole" relief pursuant to Section 1160.3 because refusal to bargain was the sole means available to Respondent to obtain court review, because he characterized the issues in the certification case as "debatable" and not "frivolous" and because there was no evidence that Respondent had engaged in dilatory tactics to avoid the bargaining obligation. He did recommend a cease-and-desist order and interim remedy which would have required periodic posting of notices advising unit employees of the status of the case as it made its way through the Board and the courts.

BOARD DECISION

The Board adopted the ALO's conclusion that by its refusal to bargain the Respondent had violated Section 1153(e) and (a) of the Act. Contrary to the ALO, it found the make-whole remedy appropriate in this case, citing its decision in Perry Farms, Inc., 4 ALRB No. 25 (1978). It rejected as unresponsive to the interests of the affected employees the view of both the ALO and the dissent that a make-whole award was not appropriate in this case because of the Respondent's motives in refusing to bargain. This approach would characterize the make-whole provision as punitive, rather than compensatory in the Board's view, and produce different results in refusal to bargain cases which were not distinguishable on the basis of the goals and policies of the Act. Finally, the Board distinguished its earlier decision concerning when attorney's fees might be awarded against respondents from the determination of the appropriateness of the make-whole relief.

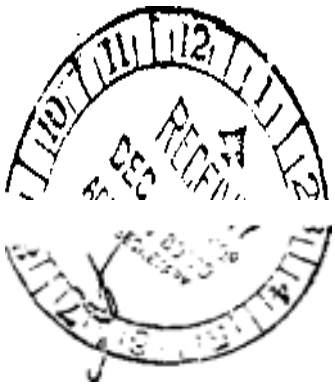
REMEDY

The Board ordered Respondent to make its employees whole for any wages or economic benefits lost as the result of its refusal to bargain. Noting that the certification in this case issued substantially after the certification in Adam Dairy, 4 ALRB No. 24 (1978), and Perry Farms, Inc., supra, the Board ordered the Regional Director to formulate a new basic make-whole wage, in part, by surveying more-recently-negotiated UFW contracts.

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD



SUPERIOR FARMING COMPANY, INC. Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	se Case No. 77-CE-33-1-D

Nancy Kirk, appearing for the General Counsel;

David E. Smith, of Indio, California, and Bert C. Hoffman, Jr., of Doty, Quinlan, Kershaw & Fanucchi, of Fresno, California, appearing for the Respondent;

Deborah Miller, of Delano, California, appearing for the Charging Party

DECISION

STATEMENT OF THE CASE

David C. Nevins, Administrative Law Officer: The case number captioned above was one of several unfair labor practice charges heard by me between September 26 and October 18, 1977, in Delano, California.!/ The original Consolidated Complaint in

1/The General Counsel's complaint against the Respondent which led to the hearing included the following case numbers: 77-CE-6-D, 77-CE-6-1-D, 77-CE-7-1-D, 77-CE-8-D, 77-CE-33-D. 77-CE-33-1-D, 77-CE-52-D, 77-CE-81-D, 77-CE-89-D, 77-CE-109-D, 77-CE-133-D, and 77-CE-113-1-D. In addition to the foregoing charges, the complaint was amended in several additional respects at the hearing, amendments not pertinent to this Decision.

this matter was issued on July 27, 1977, and the First Amended Consolidated Complaint was then issued on September 12, 1977. Further amendments were added at the hearing.

The complaint, as amended, is based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter the "UFW"), against the Respondent, Superior Farming Company, Inc. Respondent admitted at the hearing that the written charges were duly served upon it on various dates between March and September, 1977.*21* The complaint, as amended, alleges that Res-pondent violated the Agricultural Labor Relations Act (hereafter the "Act") in numerous respects, including violations of Sections 1153(a), (b), (c), (e), and (f) .

All the parties were represented and given a full opportunity to participate in the proceedings. During the hear-ing, the parties (the General Counsel, Respondent, and the Charging Party) made known their written stipulation, dated September 8, which provided, inter alia:

> --The parties agree that that portion of the Consolidated Complaint relating to refusal to bargain, charge number 77-CE-33-l-D[,] be severed from the remaining allegations of said Complaint in order that it may be expeditiously processed to appellate review.
>
> --The parties waive the right to hearing on the allegations contained in the Complaint on file herein relating to said charge, stipulate that the conduct of Respondent, SUPERIOR, constitutes a refusal to bargain and request the Board to expeditiously process this matter in order that it may be the subject of appellate review.3/

Based upon the parties' Stipulation and their mutual desire to resolve the Respondent's admitted refusal to bargain as expeditiously as possible, and because an extended hearing of some 17 days took place regarding the other unfair labor practice charges against the Respondent, I have determined to accept the parties' Stipulation and proceed directly to the refusal to bargain charge by way of this separate Decision. The remainder of the charges against the Respondent will be considered by me in a subsequent but separate decision.

2/Unless otherwise specified, all dates hereinafter refer to 1977.

3/The portions quoted above from the parties' "Stipulation" are Paragraphs 8 and 9 thereof, although as they appear above their order is reversed for greater clarity. The parties' full Stipulation is attached to this Decision and appears as Appendix "A."

The General Counsel, Respondent, and UFW all filed post-hearing briefs setting forth their respective positions on the question of the remedy to be imposed for Respondent's admitted refusal to bargain. The briefs of the General Counsel and the Respondent are limited to the question of whether the so-called make whole" remedy for a refusal to bargain, as authorized by Section 1160.3 of the Act, is appropriate as a remedy in this proceeding. The UFW's brief, as will be discussed infra, puts forth additional remedies proposed for Respondent's refusal to bargain.

Upon the record relating to Case No. 77-CE-33-1-D, including my consideration of the parties' Stipulation and their respective briefs, I make the following:

FINDINGS OF FACT

I. Jurisdiction.

The complaint, as amended, alleges that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act and that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act. The Respondent's answer admits these allegations. Accordingly, I find the instant dispute falls within the jurisdiction of the Act.

II. The Unfair Labor Practice Alleged.

The amended complaint charges, inter alia, that since April 26 and continuing thereafter the Respondent has refused to, bargain collectively with the UFW and that such refusal constitutes a violation of Section 1153(e) of the Act.4/

The Respondent essentially denied that it violated the Act by refusing to bargain with the UFW, as will be made clearer below. The Respondent filed an answer and supplemental answer in response to the General Counsel's unfair labor practice allegations, the supplemental answer concentrating on the alleged refusal to bargain matter.

4/The amended complaint's refusal to bargain allegations, including the related remedial requests, are set forth in the First Consolidated Complaint, dated July 27, but were inadvertently deleted from the First Amended Consolidated Complaint, dated September 12. At the pre-hearing conference held on September 19, the Respondent and General Counsel stipulated that the deleted refusal to bargain allegations be amended into the First Amended Consolidated Complaint as follows: the original-Paragraph 8(g) to be added as Paragraph 8(1) and Paragraphs 1 and 2 of the original prayer for relief to be added in the amended prayer for relief as Paragraphs 12 and 13, respectively.

III. The Facts.

A. The Pleadings And Stipulation:

By way of the pleadings and the parties' stipulated correction thereof it is established that the Respondent is a corporation organized under and by virtue of the laws of Nevada It is admitted that Respondent is engaged in agriculture at its premises in Kern County, California.

The parties' written Stipulation establishes the following:

1. On or about September 10, 1975, the Board conducted a representation election amongst Respondent's employees in a unit claimed by the United Farm Workers of America.

2. Respondent duly and regularly filed a Petition of Objections upon which a hearing was held in early and mid-December of 1975.

3. On or about April 26, 1977, the Board issued a decision certifying the United Farm Workers as the exclusive collective bargaining representative of Respondent's agricultural employees in the unit sought by the United Farm Workers.

4. On May 26, 1977, Respondent received a request from the United Farm Workers to bargain.

5. On May 31, 1977, Respondent advised the United Farm Workers of its belief that the certification was unlawfully and improperly issued and that Respondent challenged the validity of the aforementioned certification and the underlying election.

6.The basis of Respondent's challenge to the validity of certification and of the election is set forth in Respondent's Supplemental Answer to Consolidated Complaint.

7. For the reasons set forth in said Supplemental Answer, Respondent has refused to meet and confer with the United Farm Workers with respect to wages, hours and other terms and conditions of employment.

B. The Respondent's Supplemental Answer:

The Respondent's supplemental answer in this

proceeding, dated August 5, denies that Respondent violated Section 1153(e) of the Act. The Respondent asserts it had no duty to bargain with the UFW because the Board's certification was not made pursuant to Section 1156.3 of the Act or any other section of the Act, nor was it made pursuant to the law in such cases relating to certification of employee elections.

Respondent's supplemental answer puts forth a number of reasons for challenging the Board's certification of the UFW. What follows is only an incomplete summary of those reasons:

1. In conducting the election eligible voters were disenfranchised, which under NLRB precedent was sufficient to set aside the election.5/

2. The manner in which the election was conducted raised a reasonable doubt as to its fairness and validity, inasmuch as (a) UFW agents, organizers, or representatives engaged in unlawful and improper conduct at the polling places; (b) under NLRB precedent such conduct is sufficient to set aside the election; (c) UFW organizers with UFW propaganda were permitted' to ride the buses which carried voters to the polling places; (d) violence and imminent violence caused the polls to be closed for substantial periods; (e) an insufficient jurisdictional basis existed to invoke the Board's election machinery; and (f) due to the rapidly scheduled election the Respondent, did not have a sufficient opportunity to campaign in the election.

ANALYSIS AND CONCLUSIONS

As the Respondent openly admits, the Board certified the UFW as the bargaining representative for Respondent's employees on April 26. See Superior Farming Company, 3 ALRB No. 35. Respondent also concedes that in response to the UFW's request for collective bargaining, pursuant to the UFW's certification, that Respondent refused to recognize and bargain with the

The facts and admissions set forth in the parties' Stipulation clearly establish that Respondent refused to bargain with the UFW in violation of Section 1153(e) of the Act. As has often been recognized under the NLRA's similar bargaining provision, it is unlawful to refuse recognition of a certified union upon timely request even when the employer's refusal is based on a mistaken and good faith view of the law. N.L.R.B. v. Katz, 369 U.S. 736, 743 (1962); Ray Brooks v. N.L.R.B., 348 U.S. 96 (1954); Old King Cole v N.L.R.B., 260 F.2d 530. 532 (C.A. 6, 1958). In view of the Board's existing certification of the UFW, a decision by which I am bound, and in view of the

5/When used in this Decision, "NLRB" refers to the National Labor Relations Board; the "Federal Act" or "NLRA" refers to the National Labor Relations Act, as amended (29 U.S.C. §151, et seq.) .

Respondent's admitted refusal to bargain with the UFW within a year of the UFW's certification, I find that Respondent violated Sections 1153(e) and (a) of the Act.6/

REMEDY

I. Introduction.

As earlier noted, the parties' post-hearing briefs relating to Respondent's refusal to bargain concentrate on the question of what remedy should be imposed to correct that refusal. Because this question of remedy in the refusal to bargain context is a relatively novel one under our Act, and because our Act varies somewhat from the NLRA in this respect, my analysis as to remedy is more extensive than might otherwise be called for.

Several key provisions of the Act bear on the question of the remedy appropriate for Respondent's unlawful refusal to bargain. First, as heavily stressed in the UFW's post-hearing brief, Section 1 of our Act provides, inter alia, that the Act seeks

> . . . to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.
>
> This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state.

The California Legislature likewise announced, in Section 1140.2, that it is

> . . . the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers

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6/The Respondent has not sought in this unfair labor practice proceeding to relitigate the allegations it put forth in the representation proceeding that challenge the UFW's certification. Of course, applicable precedent under the Federal Act establishes that it would be improper to permit a respondent employer to litigate in an unfair labor practice proceeding claims which were or could have been litigated in the prior representation proceeding, unless perchance newly discovered or previously unavailable evidence was brought forward to challenge the certification. See LTV Electrosystems, Inc., 166 NLRB 938, 939, affirmed, 388 F.2d 683 (C.A. 4, 1968), cert, denied, ___ U.S. ___

> of labor, or their agents, in the designation of such representatives or in self-organization . . . .
>
> The laudible goals of the Legislature find their en forcement through the various unfair labor practice provisions established by the Act, among these being the duty of an agricultural employer to recognize and bargain with the certified re presentative of its employees. The Act also directs that upon a finding that a person has engaged in an unfair labor practice
>
> > . . . the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such per-son to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part.7/

Even the narrower albeit comparable remedial provision under the Federal Act has been recognized to bestow on the NLRB, our sister agency, "broad discretionary" remedial power to cure unfair labor practices. Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 216 (1964).And, as explained in a different context by the United States Supreme Court in N.L.R.B. v. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969):

> "A back pay order is a reparation order de-signed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." Nathanson v. N.L.R.B., 344 U.S. 344, 346 (1953).* * * *"When the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Id., at 346-347.

7/The remedial provisions quoted above are found in Section llFO.3 of the Act, a section similar to the remedial provision, Section 10(c), of the Federal Act. The portion underlined above, however, is not found within that Federal Act. It is that distinctive addition of the so-called "make whole" remedy for a refusal to bargain in our Act that causes the need for extended discussion of that potential remedy in this case.

In order to set the boundaries for my consideration of whether the make-whole remedy should be imposed in this proceeding, one other provision of our Act should be noted. Thus, Section 1148 provides:

> The board shall follow applicable precedents of the National Labor Relations Act, as amended.

II. The Make-Whole Remedy: An Analysis.

As noted, the Federal Act does not explicitly provide for a make-whole remedy in connection with an employer's unlawful refusal to bargain. Due to the absence of that explicit remedy in its governing statute, the NLRB consistently has refused to grant financial restitution to employees who suffer from their employer's unlawful refusal to bargain with their chosen representative, at least in those cases where that refusal resulted from the employer's effort to trigger review of the union's certification through the unfair labor practice procedures of the NLRA. See Ex-Cell-0 Corp., 185 NLRB 107 (1970), reversed and remanded, 449 F.2d 1046 (C.A.D.C. 1971); Tiidee Products Inc., 194 NLRB 1234 (1972).8/ Normally, when an employer challenges the NLRB's certification of its employees' bargaining representative by refusing to bargain, the NLRB imposes as its remedy a cease and desist order for refusing to bargain and prospectively orders the employer to henceforth bargain with that representative.

The NLRB's normal remedial approach to the type of refusal to bargain present in this case has been subjected to serious criticism by both legal commentators and the courts. See, e.g., Schlossberg, The Need For A Compensatory Remedy In Refusal-To-Bargain Cases, 14 Wayne L. Review, 1059 (1968); Note, Labor Law--Remedies--An Assessment of the Proposed "Make-Whole"

8/As under the NLRA, our Act provides for court review of the Board's certification of a bargaining representative only by way of an unfair labor practice refusal to bargain with that representative, not by direct court challenge of the certification itself. See Sections 1158 and 1160.8; Nishikawa Farms, Inc. v. Mahony, 66 C.A.3d 781 (1st District, 1977) Radovich v. A.L.R.B. No. 5 Civ. No. 3073 (1977); United Farm Workers of America v. Mount Arbor Nurseries, 5 Civ. No. 3426 (1977). Where an employer unlawfully refuses to bargain and his refusal is not aimed at challenging the union's certification, however, the NLRB has granted employees restitution of lost pay. E.g., Fibreboard Products, supra, 379 U.S. 203 (unlawful, unilateral subcontracting without bargaining with union); N.L.R.B. v. American Mfg Co., 351 F.2d 74 (C.A. 5, 1965) (going out of business without bargaining with union); N.L.R.B. v. George Light Board Storage, Inc., 373 F.2d 762 (C.A. 5, 1967) (refusal to execute contract previously negotiated with union); Hen House Market, 175 NLRB 596 (1969) (unilateral discontinuance of payments to pension, health, and welfare plans).

Remedy In Refusal-To-Bargain Cases, 67 Mich. L. Rev. 374 (1968). The District of Columbia Circuit, a leader in criticizing the NLRB's failure to impose stronger remedies than its normal ones in refusal to bargain cases, has thus stated (N.L.R.B. v. Tiidee Products Inc., 426 F.2d 1243, 1249 (C.A.D.C. 1970), cert, de-nied, 400 U.S. 950 (1970)).

> Employee interest in a union can wane quickly as working conditions remain appa rently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. * * * * Thus, the employer may reap a se cond benefit from his original refusal to comply with the law: he may continue to en joy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively.

Indeed, even in the leading case of Ex-Gel1-0 Corp, supra, 185 NLRB at 108, the NLRB found wanting its traditional approach to bargaining remedies:

> We . . . are in complete agreement . . . that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of two or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from the loss of employee support attributable to such delay. The inadequacy of the remedy is all the more egregious where . . . the employer ha[s] raised "frivolous" issues in order to postpone or avoid its lawful obligation to bargain.

Relying on this substantial criticism surrounding the NLRB's traditional approach to bargaining remedies, and citing the California Legislature's explicit authorization for our Board to grant make-whole remedies in refusal to bargain cases, both the General Counsel and UFW urge that Respondent be ordered to make whole its employees for losses they sustained due to the Respondent's unlawful refusal to bargain. Their position on the make-whole remedy is succinctly stated in the General Counsel's brief (p. 9):

> The General Counsel requests that the Board order make-whole in every case where the Board finds that the employer has refused to bargain in good faith and economic loss is sustained, regardless of the motivation of the employer in refusing to bargain. This position is based on the fundamental reality that the effects of the employer's unlawful refusal to bargain are the same regardless of whether the [employer's] losing defense is "colorable," "substantial," "debatable," "frivolous," "technical," or whether the employer is "testing" (appealing) a certification of the Board.

There is little doubt that persuasive reasons exist, as detailed in the briefs, for imposing the make-whole remedy against employers who reject the Board s prior certification by way of refusing to bargain. First, employees may well lose economic benefits from their employer's unlawful bargaining delay. Although the Act's make-whole provision could remedy the economic losses, other lost contract benefits, such as the absence of grievance and arbitration machinery, seniority provisions, and safety and health protections, could not be restored by the make-whole remedy. Make-whole relief, at its best, might not entirely eradicate the injury resulting from an employer's refusal to bargain. Thus, it is argued that make-whole relief is necessary to remedy at least some of the employees' injuries.

Second, employers who accept the Board's certification [6] of a bargaining representative and enter into timely bargaining with such representative would be competitively disadvantaged by , employers who avoid their bargaining obligations by challenging the Board's certification. Third, a long delay between certification and bargaining will undoubtedly dissipate a union's bargaining strength and discourage employee support. The UFW asserts that such difficulties are exacerbated by the seasonal nature of the agricultural industry, since a union is handicapped in communicating with its supporters, scattered throughout the state. Fourth, refusing to grant make-whole restitution for the time during which an employer is challenging the union's certification tends to encourage litigation and delays in collective bargaining.

Finally, anything which encourages a delay or frustration of collective bargaining after certification tends to frustrate statutory policies. Employee rights to free association and to designate their representatives are frustrated by delayed bargaining. It is also possible that delays in bargaining without the prospect of economic restitution will encourage strikes aimed at bringing the employer to the bargaining table.

Certainly, the dire and troublesome consequences cited as potentially resulting from ineffective bargaining remedies do not create a pleasing prospect. *On* the other hand, not all the consequences feared by the General Counsel and UFW seem as

inevitable or as open to government correction as those parties claim.

Thus, the economic losses (and other contract losses) that may result from an employer's delayed bargaining are similar in kind and nature to those losses suffered when an employer enters into collective bargaining but refuses to accede to the union's bargaining demands. Nonetheless, our Act only mandates that an employer must "bargain collectively in good faith," but that "obligation does not compel either party to agree to a proposal or require the making of a concession." Section 1155.2. In other words, employees do not automatically achieve greater benefits from an employer's timely compliance with his bargaining obligation where their employer engages in hard but lawful bargaining.9/ Furthermore, although the General Counsel asserts that every UFW contract results in greater benefits, evidence in the instant proceeding does compel that as an inevitable conclusion with respect to the Respondent, a company which purportedly prides itself already in maintaining premium wages and working conditions for its employees.

The points raised in the immediately preceding paragraph also bear on the view that recalcitrant employers put their law-abiding competitors to economic disadvantage. Thus, hard bargaining employers, who lawfully refrain from reaching a favorable bargain with a union, likewise put their competitors to a disadvantage. Also, since our Act is relatively new, it is difficult to factually conclude that an economic disadvantage is truly created for law-abiding employers who are forthcoming in their bargaining with a union, as compared to those who refuse to bargain in order to challenge a union's certification. Due to the seasonal nature of agriculture, many law-abiding employers may not--in fact--reach agreement with their employees certified representative until a season subsequent to the employee election or even certification, perhaps not much sooner than the employer who loses his legal challenge against certification. I do not presume to know the foregoing as fact, but the record before me certainly does not establish the contrary conclusion urged on me by the General Counsel.

To be sure, any substantial delay in an employer's recognition of a union may well cause weakening of support for the union and greater difficulty for it in achieving its contractual demands. But, serious policy questions remain as to whether and how this Board should jump into the occasion, intervening through its remedial force, in an effort to restore the bargaining

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9/Although certain studies indicate that bargaining contracts are likely to result when an employer timely engages in negotiations following a union's certification (see Ex-Cell-O , supra, 185 NLRB at 115, notes 47, 48), such studies likewise indicate that those employers who challenge certifications are far more likely to be employers bent on hard and uncooperative bargaining, employers who may never reach agreements with their employees' chosen representatives.

strength of a union. Clearly, the Act openly allows for a market place testing of strength between the bargaining parties through negotiation, hard bargaining, publicity confrontation, strike, and lockout. This is not to say that some restoration of equity is inappropriate for a union whose strength is weakened by an employer's unlawful refusal to bargain, but it is to say that a serious question arises as to whether the somewhat artificial remedy of imposing increased economic benefits in behalf of employees for the period during which an employer unsuccessfully challenges a union's certification is either appropriate or the most appropriate means for rectifying that employer's particular unfair labor practice. Although it may not be appropriate for this agency to shy away from the make-whole remedy because of the difficulty inherent in the remedy's implementation, one cannot help but recognize that implementation of the make-whole remedy poses serious problems. Thus, *a* majority of the NLRB itself has characterized the make-whole remedy as both a penalty and a remedy involving substantial difficulties. Ex-Ce11-0 Corp., supra, 185 NLRB at 108-109. The Second Circuit Court of Appeals has said the following in respect to the remedy: To grant the make whole remedy is "to undertake the speculative adventure of fixing damages by 'determining' whether the parties would have reached an agreement if they had bargained in good faith and what the terms of that hypothetical agreement would have been." Lipman Motors, Inc. v. N.L.R.B., 451 F.2d 823, 829 (1971). Indeed, the court in Tiidee Products, while urging consideration of the make-whole remedy, remarked:

> [We do not] suggest either that the Board can compel agreement or that the make-whole remedy is appropriate under circumstances in which the parties would have been unable to reach agreement by themselves. Quite the contrary, we have specifically limited the scope of our remand first, to consideration of past damages, not to compulsion of a future contract term, and second, to relate damages based upon a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act. [426 F.2d at 1251.]

No doubt can seriously exist that there would be great difficulty in each case such as this to determine whether an employer, like Respondent, would have reached agreement with the UFW had it timely bargained and, if so, when and what the economic terms of that agreement would have been. Even commentators who have urged the NLRB to impose a make-whole remedy have recognized the inordinant difficulty in determining the appropriate measure of damages, a difficulty that could well lead to protracted proceedings and further delays in the bargaining process. See Note,

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Labor Law--Remedies, supra, 67 Mich. L. Rev. 374.10/

In addition to the foregoing considerations, however, even more significant concerns arise in respect to granting the make-whole remedy in a case such as this. These concerns have a direct bearing on whether, as the Legislature indicated, the make-whole relief is "appropriate" to remedy the Respondent's "technical" refusal to bargain, a refusal raised in order to test the Board's unreviewed certification of the UFW.

When the Legislature approved of the make-whole remedy, it did not write on a totally clean slate. Although the NLRB, as noted, has repeatedly claimed the absence of make-whole authority under its statute, the NLRB's own view of the matter is not necessarily the state of law under the Federal Act.

At least one federal court, the District of Columbia Circuit, has concluded, contrary to the NLRB, that the Federal Act authorizes a make-whole remedy for employer refusals to bargain, under the broad remedial mandate of that act. Tiidee Products, supra, 426 F.2d 1243; Ex-Cell-0 Corp. v. N.L.R.B. 449 F.2d 1046 (1971). Other federal courts have assumed, without deciding the question, that the NLRB possesses make-whole authority

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10/ The General Counsel and UFW apparently reject the notion that make-whole relief is only applicable when it can be reasonably shown that the employer would have reached agreement with the union, for as pointed out by the General Counsel's brief (pp. 29-30):

> It is virtually impossible to prove that but for the employer's bad faith, there would have been a contract . . . . By the time the board finds the employer has re fused to bargain in good faith, the si tuation at the time of the initial certi fication cannot be reconstructed. It would never be possible to predict what each party would have agreed to at that time. Since it is the employer's illegal conduct that has made it impossible to determine what would have happened but for the illegal conduct, it is only fit ting that the board assume that a con- tract would have been signed for the pur pose of granting make-whole.

Contrary to the General Counsel, I am not convinced that this fixing of a reparation order, which could be of significant proportion, can be based merely on the assumption a contract "would have been signed" by the parties, especially in view of the Act's allowance for and protection of the economic combat and struggle that are commonly associated with the collective bargaining process.

under the Federal Act. United Steelworkers of America v. N.L.R.B. (Metco), 496 F.2d 1342 (C.A. 5, 1974); Culinary Alliance & Bartenders. Local 703 v. N.L.R.B., 488 F.2d 664 (C.A. 9, 1974), cert, denied. 86 LRRM 2643; Lipman Motors, supra, 451 F.2d 823 (C.A. 2, 1971).

Although one cannot say a unanimity of view exists as to the NLRB's statutory authority to grant make-whole relief, one can say that in every instance where such remedial power has been found or assumed to exist the standard for its application in cases such as this case is uniform. As the leading proponent of make-whole relief, the District of Columbia Circuit has said that the power to grant make-whole relief "requires the Board to determine whether an employer's refusal to bargain is a flagrant violation of the Act because its legal objections are frivolous, and if so, whether 'make-whole' relief or some other special remedy should be granted." Ex-Cell-0, supra, 449 F.2d at 1049. The court went on to assert that its view of make-whole relief 10 recognizes that an (ibid.):

> . . . employer's refusal to bargain based on a frivolous challenge to an election is of itself a serious and manifestly unjustified repudiation of the employer's statutory duties and a denial of employees' statutory rights to collective bargaining, and that "make-whole" compensation is a proper remedy in such circumstances .

In each of the federal appellate cases dealing with the question of make-whole relief, cases cited above, the courts have likewise concluded that make-whole relief should be granted in cases like the instant one only where the employer, who refuses to bargain, seeks to challenge the union's certification on frivolous grounds or for reasons of delaying his bargaining obligation. Indeed, the District of Columbia Circuit has only gone that far when concluding that make-whole relief may be appropriate. Compare, United Steelworkers of America v. N.L.R.B (Quality Rubber). 430 F.2d519 (C.A.D.C. 1970); Food Store Employees Union Local 347 v. N.L.R.B. (Heck's), 476 F.2d 546 (C.A.D.C. 1973), cert, denied, 414 U.S. 1069. So too in those cases where it has considered make-whole relief, the NLRB has considered it only in light of whether the employer rejects his bargaining obligation on frivolous or insubstantial grounds or for reasons of delay. Tiidee Products, Inc. 194 NLRB 1234 (1972); Tiidee Products, Inc., 196 NLRB 158 (1972) .11/

11/The General Counsel would ignore all of the foregoing court and NLRB considerations of make-whole relief, inasmuch as those cases arose only because the NLRA does not explicitly provide for make-whole relief and are, therefore, inapposite to our Act which does provide for such relief. The trouble with the General Counsel's position is twofold: First, it ignores the fact that numerous federal courts have dealt with the make-whole remedy as if the NLRB did possess such authority, thus making such decisions pertinent to our Act; second, --(cont

The greatest difficulty, however, in following the standards set forth in those federal decisions vis the make-whole relief is in determining whether their remedial standard is persuasive under our Act or merely a minimum standard raised by the judiciary because the Federal Act does not explicitly grant make-whole relief and because the NLRB's traditional remedies are obviously inadequate. Review of those decisions fails to demonstrate whether, had the Federal Act explicitly provided for make-whole relief when "-appropriate," the courts would have been even more expansive in their views as to the remedy.

Nonetheless, at least two concerns expressed in the federal decisions have a bearing on my determination as to when make-whole relief is appropriate. To begin with, one of the chief concerns for granting such relief is to discourage the frivolous refusals to bargain which have so clogged the NLRB and federal court dockets and, have in turn, resulted in wholesale attempts to delay bargaining with appropriate employee representatives. See Tiidee Products, supra, 426 F.2d at 1249-1250. Second, it has been recognized that the NLRB should go slow in granting make-whole relief against an employer who seeks judicial review of the NLRB's certification of a union, since only by refusing to bargain with that union can an employer attain such judicial review. See United Steelworkers (Metco), supra, 496 F.2d at 1353; Lipman Motors, supra, 451 F.2d at 829.12/

Of course, these two concerns are as true under our Act as they are under the Federal Act. Indeed, many of the reasons put forward by the General Counsel for granting make-whole relief serve as a deterrance for employers who raise frivolous election objections or who engage in bad faith bargaining delays.

It is no easy task to discover what the California Legislature intended when it granted make-whole relief in the Act, except that by granting the Board power to award such relief

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11/(continued)--at the very least such court decisions are worthy of consideration when determining when make-whole relief is "appropriate" under our newly enacted statute.

12/To be sure, as noted by the General Counsel and UFW, normally a wrongdoer's financial liability is not suspended during the time he seeks adjudication of his wrongdoing. See Console v. Federal Maritime Commission. 383 U.S. 607, 624-625 (1966).On the other hand, an employer's obligation under our Act to bargain does not commence until the employee representative is certified by the Board, and the Act makes clear that that certification is open to judicial review by way of a refusal to [1] bargain. See Note 8, supra. Accordingly, it is not so clear that an employer should be responsible for what could be a sizeable reparation order until review of his objections to a union's certification are laid to rest and his affirmative duty to bargain is finally established, at least in the absence of other compelling circumstances.

"when the board deems such relief appropriate," the Legislature surely established a' discretionary power for the Board. Thus, automatic implementation of make-whole relief whenever employees suffer potential loss from an employer's refusal to bargain, as urged by the General Counsel, finds no explicit authority in the statute's terms.

Furthermore, during hearings held before the California Senate Industrial Relations Committee, Rose Bird, then Secretary of Agriculture and a chief proponent of the Act (designated at the time as Senate Bill 1), repeatedly confirmed that our Act's make-whole provision was "giving discretion to the board to give backpay to employees where there has been bad faith, and . . . that's an equitable remedy." Public Hearing, Senate Industrial Relations Committee, Califomia""State Legislature, Senate Bill 1, Third Extraordinary Session (May 21, 1975) (Tr. 65). As Ms. Bird indicated, "what we're talking here is only where an employer bargains in bad faith." Ibid. "It's merely within its power to give backpay where there has been a failure to bargain in good faith." Id., at 67.13/

One further consideration arises in respect to applying the make-whole remedy in this case, a consideration emphasized in the Respondent's brief. It can fairly be said that make-whole relief is an extraordinary remedy in the annals of labor law. Thus, despite court approval of the remedy, the NLRB has not once granted make-whole relief against an employer who refuses to bargain in order to test NLRB certification of a union. To a large extent, of course, the extraordinary nature of make-whole relief stems from the NLRB's view that such relief is not permitted under the Federal Act. Nonetheless, even in those cases where make-whole relief is recognized as among the permissible remedies, as the "law of the case," the NLRB has declined to grant

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13/In connection with Ms. Bird's statements, it might be noted that the following appears in a published article written by Herman M. Levy, a consultant employed in drafting the Act:

> Although the question of whether Congress granted this [make whole] power to the NLRB still is debated by some labor lawyers, there is no doubt that the ALRA has given this potent remedy to the ALRB. The grant of power, however, is tempered by the phrase "when the Board deems such relief appropriate." The Board is not likely to use this remedial power in every refusal to bargain case, but the fact that it is available may cause employers to be more cautious in refusing to bargain for insubstantial or frivolous reasons." [Levy, The Agricultural Labor Relations Act _of 1975--La Esperanza *Se* California Para El Futuro, 15 Santa Clara Lawyer No. 4, pp. 783, 803.]

the remedy. Tiidee Products, supra, 194 NLRB at 1234.

Although not truly analogous to the instant case, Western Conference of Teamsters (V. B. Zaninovich), 3 ALRB No. 57 (1977), offers some insight into the issues concerning make-whole relief in this case. In Zaninovich, the Board, recognizing the extraordinary character of granting legal costs to successful parties in an unfair labor practice proceeding, announced its policy to follow NLRB precedent in that remedial area. The Board stated, "The NLRB holds the appropriateness of this remedy to be dependent upon a characterization of the respondent's litigation posture as either 'frivolous' or 'debatable!. * * * * We therefore propose to adopt these categories in this and future cases presenting the question of such awards." (Slip Opinion, pp. 7-8).

While Zaninovich dealt with a remedial power not expressly provided for by the Act, it does shed some light on the Board's thinking. For one thing, given the extraordinary nature of the remedy in issue therein, the Board decided to track NLRB precedent. For another thing, the Board focused on a "case-by-case approach," which might be wise where--as here--an extraordinary remedy is asked for and we have had little experience as yet under the Act to determine the full parameters of its appropriateness. Finally, in Zaninovich the Board took note of the following policy in guiding application of our remedial powers (Slip Opinion, p. 7):

> "Effective redress for a statutory wrong should both compensate the party wronged and withhold from the wrongdoer the fruits of the violation.'" [Citation omitted.] Against these factors must be balanced the right of a respondent to offer all legitimate defenses and arguments.

It is difficult, in this case of first impression, to draw a proper remedial balance between the legitimate rights of Respondent's employees to engage in timely collective bargaining, preventing Respondent from reaping the benefits which might i flow from its delayed bargaining obligation, and at the same time) preserve for Respondent the opportunity, without undue penalty, to seek court review of the Board's certification of the UFW.14/ For, as much as I am persuaded that potential employee injury exists due to Respondent's refusal to bargain and am fearful of

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14/The Board has not yet issued any decision with make-whole relief. At least four cases involving make-whole relief are now pending before the Board (that I know of), all of which have granted make-whole relief for the refusals to bargain therein. P & P Farms, 76-CE-23-M (June 14, 1977); Perry Farms, Inc., 76-CE-l-S (March 10, 1977); Romar Carrot, 76-CE-35-M "(April 28, 1977); Adam Dairy, 76-CE-15-M (May 3, 1977). None of these cases dealt with an employer's refusal to bargain in order to challenge a Board certification, however.

the possible benefit Respondent might derive from _delaying its bargaining obligation, I am just as concerned about granting the heavy remedy requested by the General Counsel and thereby possibly chill a legitimate right of employer-respondents to gain court review of their bargaining obligation by making them unduly responsible for financial payments which, as the General Counsel concedes, might not have been forthcoming if their unlawful refusal to bargain had not occurred in the first place.

On balance, however, I have concluded that in cases such as this one, make-whole relief should be granted only upon a showing that the employer-respondent has refused to bargain for frivolous reasons or where he has sought delay in order to defeat the certified union. In the first instance, a make-whole remedy would be appropriate where the employer raises predominately frivolous objections to the certification, as measured against prevailing law and reason.15/ In the second instance, the make-whole remedy would be available in cases where the employer delays his bargaining obligation and, either before or after certification, acts in such an unlawful manner as to evidence his desire to defeat the certified union by way of other unfair labor practices.

In applying the standard of frivolousness to an employer's certification challenge, we do have available a method to add certainty to any prospective make-whole relief. When the Board reviews an employer's objections in the certification proceeding, it could, at that time, indicate its view as to the propriety of the employer's objections. Thus, an employer would know that if it persisted in opposing the certification, where its objections have been deemed frivolous or insubstantial, make-whole relief would be available to remedy any subsequent unlawful refusal to bargain. Further, if an employer persists in his objections to a certification based on his challenge of the credibility resolutions made at the objections hearing, so too I believe his persistence should be deemed frivolous. He would be on notice that if he unsuccessfully persisted in challenging a certification based on credibility arguments it would likely lead to make-whole relief.16/

15/Although the NLRB in Ex-Cell-0 indicated that a standard of "frivolousness" would be difficult to apply (185 NLRB at 109), I do not think that subsequent cases have agreed that such difficulty actually exists. See Zaninovich, supra, 3 ALRB No. 57; Ex-Cell-O, supra. 449 F.2d at 1050; Heck's, Inc., 215 NLRB 765 (1974).The difficulty will be significantly de-creased if reviewing courts grant to the Board its "usual latitude," as the District of Columbia court said in Ex-Cell-0, to exercise its remedial discretion.

16/Although there is some suggestion made in case law that challenge of a credibility resolution should not be deemed a frivolous challenge, I believe a contrary conclusion should exist in the refusal to bargain context. As repeatedly noted by the Board, "it is our policy not to overturn such credibility resolutions, the product of the observation of the -- (cont.)

I have concluded that, at least, during these early days of implementing -our statute, the standards set forth above are those most appropriate for granting make-whole relief in cases such as this one. The standards will serve to discourage refusing to bargain for insubstantial reasons, discourage frivolous litigation over the certification process, and add a strong element of equity to the make-whole relief when granted against an employer who irresponsibly chooses to frustrate the Board's policies and his employees' rights. On the other hand, it provides for freedom to employers who have substantial, non-frivolous objections for challenging a union's certification to pursue court review, without fear of being unduly penalized.*17/*

Finally, in refraining from precipitously granting make-whole relief in every case where an employer refuses to bargain in order to test the union's certification, the Board will have more time and experience to evolve clear election standards, without fear of unduly treading on important appellate 10 rights, or granting a remedy difficult to implement, or creating a remedial right that may lead to further bargaining delays and complex reparations litigation. Evolving experience may demonstrate that make-whole relief should be granted in more instances than those I have indicated; with continuing experience under our Act, however, that remedial conclusion can be reached through emperical evidence, rather than through the conjecture which

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16/(continued)--witnesses, unless a clear preponder ance of the relevant evidence shows them to be incorrect." Zaninovich, supra, 3 ALRB No. 57 (Slip Opinion, p. 1, n. 1). Thus, once credibility conflicts are resolved at the objections hearing and are approved by the Board, no Administrative Law Officer would (nor the Board, for that matter) overturn those resolutions in a subsequent unfair labor practice proceeding. Nor is it likely that a court of appeals would rule in the employer's favor. See N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 407, 408 (1962); N.L.R.B. v. L. E Farrell Co., 360 F.2d 205, 207 (C.A. 2, 1966)"! And, if the objecting employer is able to convince a reviewing court to disregard the credibility resolutions made at the objections hearing and, thus, succeed in overturning a union's certification, any make-whole relief granted by the Board in respect to the employer's refusal to bargain would also fail. In view of the issues at stake in the refusal to bargain context, I believe it appropriate to place the remedial risk on the employer who rejects bargaining in order to pursue a quixotic challenge to facts established by way of credibility resolutions .

17/ I might note that unlike the NLRA our Act provides that those who seek to challenge the Board's unfair labor prac tice findings must do so by filing their petitions with a court of appeal "within 30 days from the date of the issuance of the Board's order." Section 1160.8, Thus, it may well be that the substantial time lapse between the certification process and enforcement of the bargaining obligation as exists under the NLRA, and which has resulted in a need for more effective remedies under that Act, may not be so great under our Act.

exists at this juncture. It seems to me that my conclusions above are more in keeping with what the Legislature intended in respect to make-whole relief in cases such as this than the General Counsel's contention that such relief should be granted in every instance of a refusal to bargain where potential financial injury exists.

III. The Applicability Of Make-Whole Relief To Respondent's Conduct.

I believe that the standards I think applicable for granting make-whole relief lead to the conclusion that make-whole relief is inappropriate in this case. As noted earlier, the parties' Stipulation establishes that Respondent has refused to bargain because it seeks to challenge the UFW's certification for the reasons asserted in its supplemental answer. A review of those reasons, in light of the Board's certification decision, does not demonstrate that Respondent's refusal to bargain results from frivolous or insubstantial reasons.18/

To begin with, the Board's certification decision acknowledges forthrightly that Respondent's election objections cannot be deemed insubstantial or frivolous. As the Board recognized (3 ALRB No. 57, Slip Opinion, pp. 2-3):

> The election at Superior Farming was one of the largest elections conducted by the Fresno Regional Office during the early days of our Act. Numerous problems were encountered resulting in confusion and some degree of chaos during the course of the election. Many of the problems might have been averted had the Board agents and par ties been more experienced in conducting elections of this type . . .
>
> The parties spent much time and effort at the hearing and in their briefs detailing the alleged misconduct. Were we willing to adopt per se rules we would be compelled to set this election aside.

Elsewhere, the Board noted that its conclusions in regard to Respondent's election objections departed, somewhat, from the

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18/It is also my conclusion that the parties' Stipulation forecloses the argument that Respondent refused to bargain in order to gain time to dissipate the UFW's strength through other unfair labor practices, an argument that would present additional considerations in weighing make-whole relief. I note in this regard that the parties stipulated that Respondent's admitted refusal to bargain be severed from the remainder of unfair labor practice charges lodged against Respondent and that a hearing on the refusal was waived. I feel bound by that stipulation.

rule established in Milchem, Inc., 170 NLRB No. 46 (1968).

The defenses raised by Respondent vis-a-vis the election are aimed at much of the conduct found to exist by the Board. Thus, Respondent does not seek to overturn credibility resolutions made in that certification hearing as a basis for its attack on the election. Indeed, Respondent essentially contests the Board's legal analysis of election conduct rules and its departure from precedent established under the NLRA.

In the context of this case, I cannot say that Respondent's defenses to the UFW's certification are frivolous or insubstantial.19/ Nor can I say that Respondent has interposed its objections to the election to delay its bargaining obligation. Significantly, Respondent voluntarily entered into a Stipulation seeking early review of its election objections. Nothing in the record indicates that Respondent's conduct is tantamount to unduly and in bad faith creating delay in the UFW's certification. And, in this regard, I note that Respondent timely filed its election objections and pursued them to a hearing. Thus, we do not have an employer who has refused to bargain, but who has made no effort to seek proper adjudication of his election objections.

For all the foregoing reasons, I conclude that Respondent has not acted frivolously in refusing to bargain. Accordingly, I find that the make-whole remedy is inappropriate to remedy the Respondent's unlawful refusal to bargain.

IV. Conclusion As To Remedies.

Having found that Respondent unlawfully refused to bargain I recommend the following:

1. That an order be issued directing Respondent to cease and desist from unlawfully refusing to bargain with the UFW and directing Respondent to bargain collectively, in good faith, with the UFW, the certified representative of its employees.

2. That Respondent post, publish, and serve the attached Notice To Workers, translated into languages deemed appropriate by the Regional Director, in the following manner:

19/Contemporaneously with filing its brief in this matter, Respondent submitted a Motion to Reopen the Hearing in this proceeding. Respondent's motion seeks to adduce evidence ' in regard to its challenge of the election results and its conduct surrounding its refusal to bargain. Inasmuch as Respondent never sought to present such evidence in the unfair labor practice hearing that took place, and inasmuch as I have found that make-whole relief is inappropriate in this case, I hereby deny Respondent's motion.

a. Distribute the Notice to all present employees and to all employees -hired by the Respondent within six months of Respondent's initial compliance with this Decision and Order;

b. Mail a copy of the Notice to all employees em ployed by Respondent between September 11, 1975 (when the election took place) , and the time the Notice is mailed if such employees are not then employed by the Respondent. The Notice is to be mailed to the employees' last known addresses or more current addresses if made known to Respondent;

c. Post the Notice in prominent places throughout Respondent's agricultural operations in areas frequented by employees and where other notices are posted by Respondent for employees, such posting to last for six months;

d. Have the Notice read in English, Spanish, or other language used by employees, on Company time to all employees by a Company representative or by a Board agent, and to accord said Board agent the opportunity to answer questions which employees may have regarding the Notice and their rights under Section 1152 of the Act.20/

3. The UFW, noting the crucial importance that collective bargaining plays in the scheme of our Act, has asked for additional remedies against the Respondent. One of its requested remedies I find appropriate- -namely, that the UFW be granted sufficient space on convenient bulletin boards for its posting of notices and the like for a period from Respondent's beginning compliance with the mandates of this Decision and Order until the Respondent's bargaining obligation is complied with or until such obligation ceases to exist .21/

4. In addition, I believe it appropriate that, in conformity with Sunnyside Nurseries, Respondent provide the UFW the names and addresses of all employees who will receive the Notice To Workers .

In carrying out the foregoing remedial recommendations, I recommend to the Board that, as to some of them, that the Board seek such interim relief as may be appropriate under Section 1160.4 of the Act. In particular, I think it appropriate that temporary relief be sought in the following instances : the posting, publishing, distribution, and reading of

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20/I have set a period of six months for the posting and serving of the Notice in conformity with Sunnyside Nurseries, 3 ALRB No. 42 (1977). Due to the importance of employee collective bargaining rights, and in view of my other recommendations which follow, I believe a six-month period is appropriate.

21/The UFW also requests legal costs, access for its organizers, reimbursement of costs associated with the contact of workers during the period of Respondent's refusal to bargain, and reimbursement of lost dues. I do not find these remedial requests appropriate in the circumstances of this case.

the Notice by Respondent, granting to the UFW bulletin board space, and giving to the UFW the names and addresses of employees, as noted above.

I recognize that the foregoing recommendation with respect to temporary relief is somewhat unusual. But, in view of the serious remedial problems, previously discussed, I find such relief appropriate.

As earlier noted, there is general agreement that the normal remedies for an employer's unlawful refusal to bargain (i.e., a cease and desist order and an order to prospectively bargain) are seriously inadequate to remedy such refusal. The inadequacy largely results from the delay inherent between certification of a union and eventual court review of the employer's refusal to bargain. Although this delay will, hopefully, be shorter under our Act than under the Federal Act, it cannot be doubted that a delay will occur.

Nor can it be doubted that due to the lapse of time between certification and bargaining, employees will be confused, growing disinterested in the exercise of their rights under the Act, and that the UFW[1]s position as their bargaining representative will be weakened because of lost employee support. These hazards due to the bargaining delay surely are compounded in the agricultural industry, since it is more difficult for a union to maintain contact with employees due to the employees' transience and their distribution over large work areas. Indeed, in the Respondent's case, even its permanent workers are spread over some 20,000 or 30,000 acres in Kern County.

By the time a court of appeals enforces the Board's certification and bargaining order herein it may be too late to fully restore the balance in strength and in employee support that existed when the employees voiced their support for the UFW in the 1975 election. I am deeply concerned that if no interim relief is available important statutory rights will be lost or weakened.

By seeking the interim relief I have recommended, two salient goals will be achieved. First, through making known the Notice To Workers prior to court enforcement, workers will be more timely advised of the progress of this litigation, the reason why their designated representative cannot now bargain with the Respondent, and that their rights have not been ignored by the government agency charged with their protection. Second, the recommended interim relief will allow the UFW to continue to advise employees of this litigation and communicate with them regarding bargaining matters. Ironically, if such interim relief is not available, a union which seeks to organize workers will have greater communication rights under the so-called "Access Regulation" than a union which actually succeeds in attaining majority support of employees through the election process. Employee contact with the UFW, as provided for by the interim relief recommended, will at least restore some balance to

employees in the exercise of their rights under Section 1152 of the Act.22/

Nor do I believe that the recommended interim relief unduly prejudices the Respondent's rights. To be sure, whatever financial costs are inherent in providing the interim relief may be lost to Respondent if it succeeds in its challenge of the UFW's certification. But, such costs surely will be minimal. Furthermore, an employer should not be entitled to jeopardize important employee rights, by refusing to bargain with its employees' selected representative, and simply be ordered at some indefinite, future date to bargain. Otherwise, all the risk attendant to court challenge of a Board certification falls on the certified union and none on the employer; that inequitable situation should not be tolerated under our Act. Furthermore, by framing the Notice To Workers as I have, the Respondent's position in regard to the UFW's certification is preserved and also made known to the employees, thus lessening any injury Respondent might believe it suffers from the recommended interim relief.

ORDER

Respondent, its officers, agents, and representatives shall:

1. Cease and desist from refusing to bargain with the certified representative of its employees, the United Farm 25 Workers of America, AFL-CIO.

2. Take the following affirmative action:

a. Post, publish, and serve the attached Notice To Workers, translated into such languages as deemed appropriate by the Regional Director, in the manner set forth below:

(1) Distribute the Notice to all present employees and to all employees hired by the Respondent within six months of Respondent's initial compliance with this Decision and Order;

(2) Mail a copy of the Notice to all em ployees employed by Respondent between September 11, 1975, and the time the Notice is mailed if such employees are not then employed by the Respondent. The Notice is to be mailed to the employees' last known addresses, or more current addresses if made known to the Respondent.

22/The means I have chosen as appropriate for the UFW to maintain contact with Respondent's workers will avoid the I more serious obstacles surrounding direct access by the UFW to workers in the fields. Also, the form of the Notice To Workers I have herein recommended assumes that the Notice will be presented to employees prior to final court enforcement of the Respondent's bargaining obligation.

(3) Post the Notice in prominent places throughout Respondent's agricultural operations in areas frequented by employees and where other notices are posted by Respondent for employees, such posting to last for six months.

(4) Have a representative from Respondent, or Board agent, read the Notice to employees on Company time, in English, Spanish, and other language deemed appropriate by the Regional Director, and accord a Board agent the opportunity to answer questions which employees may have regarding the Notice and their rights under Section 1152 of the Act.

b. Grant the UFW sufficient space on convenient bulletin boards for its posting of notices and the like for a period from Respondent's beginning compliance with the mandates of this Decision and Order until the Respondent's bargaining obligation is complied with or until such obligation ceases to exist.

c. Provide the UFW the names and addresses of all employees who will receive the Notice To Workers.

d. Preserve and make available to the Board or its agent, upon request, for examination and copying all Company records necessary to determine whether the Respondent has complied with this Decision and Order to the fullest extent possible.

e. Notify the Regional Director of the Fresno Regional Office within 20 days from receipt of a copy of this Decision and Order of steps the Respondent has taken to comply therewith, and to continue reporting periodically thereafter until full compliance is achieved.

Dated: December 3, 1977.

AGRICULTURAL LABOR RELATIONS BOARD

By David C. Nevins

David C.Nevins
Administrative Law Officer

NOTICE TO WORKERS

The Agricultural Labor Relations Board has found that we interfered with the rights of the workers at the Company by refusing to bargain with the United Farm Workers of America, which a majority of employees voted for in September of 1975. The Board has told us to send out, post, and read this Notice to our employees.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. to organize themselves;

2. to form, join or help unions;

3. to bargain as a group and choose whom they want to speak for them;

4. to act together with other workers to try to get a contract or to help or protect one another;

5. to decide not to do any of these things.

As we told you, we have been found in violation of our obligation to recognize and bargain with the United Farm Workers Union. However, we do not agree that we have an obligation to recognize and bargain with the Union and we intend to get our obligation tested in the courts. If we lose our fight in the courts, we will then recognize and bargain with the Union which you elected; if we win our fight in the courts, we will not have to recognize and bargain with the Union unless you again elect it as your representative.

While we pursue our fight in the courts over the Union's election victory, we will provide the Union space on our bulletin boards and the names and addresses of our workers so that the Union can keep you advised as to your rights under the Agricultural Labor Relations Act. As soon as possible you will be informed of whether the courts agree with us or with the Union as to whether we must recognize and bargain with the Union.

Dated: _____

SUPERIOR FARMING COMPANY

By _____

(Representative) (Title)

APPENDIX A

9/12/77

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

STATE OF CALIFORNIA

SUPERIOR FARMING CO., INC., Respondent Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 77-CE-6-D 77-CE-7-D 77-CE-8-D 77-CE-33-D 77-CE-33-1-D 77-CE-6-1-D STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel:

I

On or about September 10, 1975, the Board conducted a representation election amongst Respondent's employees in a unit claimed by the UNITED FARM WORKERS OF AMERICA.

II

Respondent duly and regularly filed a Petition of Objections upon which a hearing was held in early and mid-December of 1975.

III

On or about April 26, 1977, the Board issued a decision certifying the UNITED FARM WORKERS as the exclusive collective bargaining representative of Respondent's agricultural employees in the unit sought by the UNITED FARM WORKERS.

IV

On May 26, 1977, Respondent received a request from

the UNITED FARM WORKERS to bargain.

V

On Hay 31, 1977, Respondent advised the UNITED FARM WORKERS of its belief that the certification was unlawfully and improperly issued and that Respondent challenged the validity of the aforementioned certification and the underlying election.

VI

The basis of Respondent's challenge to the validity of the certification and of the election is set forth in Respondent's Supplemental Answer to Consolidated Complaint, a copy of which is annexed hereto.

VII

For the reasons set forth in said Supplemental Answer, Respondent has refused to meet and confer with the UNITED FARM WORKERS with respect to wages, hours and other terms and conditions of employment.

VIII

The parties waive the right to hearing on the allegations contained in the Complaint on file herein relating to said charge, stipulate that the conduct of Respondent, SUPERIOR, constitutes a refusal to bargain and request the Board to expeditiously process this matter in order that it may be the subject of appellate review.

IX

The parties agree that that portion of the Consolidated Complaint relating to refusal to bargain, charge number 77-CE-33-1-D be severed from the remaining allegations

of said Complaint in order that it may be expeditiously processed to appellate review.

DATED: September 8, 1977

DOTY, QUINLAN, KERSHAW & FANUCCHI

By _____
WILLIAM A. QUINLAN
Attorney for Respondent, SUPERIOR FARMING COMPANY

_____
FOR SUPERIOR FARMING COMPANY

_____
FOR THE UNITED FARM WORKERS, AFL-CIO

_____
FOR THE GENERAL COUNSEL